EXHIBIT 11

Page 1

1   IN THE UNITED STATES DISTRICT COURT
        FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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    THE CITY OF HUNTINGTON,

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               Plaintiff,

6

    vs.   CIVIL ACTION

7   NO. 3:17-01362

    AMERISOURCEBERGEN DRUG

8   CORPORATION, et al.,

9   Defendants.

10 _____

11 CABELL COUNTY COMMISSION,

12   Plaintiff,

13 vs.   CIVIL ACTION
                                          NO. 3:17-01665

14 AMERISOURCEBERGEN DRUG
    CORPORATION, et al.,

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               Defendants.

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19   Videotaped and Zoom video conference
    deposition of JAMES RAFALSKI taken by the Defendants

20 under the Federal Rules of Civil Procedure in the
    above-entitled action, pursuant to notice, before

21 Jennifer Vail-Kirkbride, a Registered Merit
    Reporter, on the 11th day of September, 2020.

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1   all of them.

2   Q.   Okay. Do you know whether it was between 1

3   and 99 percent of these orders that went to fill

4   legitimate medical needs?

5   A.   I don't know, sir.

6   Q.   Do you know -- am I right in understanding

7   you believe all of these tens of millions of orders

8   should have been reported to the DEA as suspicious?

9   A.   Oh, that's a different question.

10   Q.   Should they -- should all of these tens of

11   millions of orders that you flagged in Method A have

12   been reported to the DEA as suspicious? Yes or no?

13   A.   No.

14   Q.   Okay. How many should have been reported

15   to the DEA as suspicious?

16   A.   The nature of my application of the

17   methodology, the algorithm, wasn't for the purpose

18   to identify orders that would be reported to the

19   DEA. It was just a triggering mechanism to identify

20   orders from the transactional data from the

21   defendants. It -- it would -- it's a much -- it's

22   broader, it's a broader requirement for the

23   defendants than -- than just to -- for me to apply

24   an algorithm to their transactional data and then

 1   say they should have reported them. That's -- I

 2   mean, that's outside of what occurred here.

 3   Q. Okay. So these tens of millions of orders,

 4   can you give me any definition as to whether any of

 5   them, and if so how many, should have been reported

 6   to the DEA as suspicious?

 7   A. I -- I didn't do that kind of

 8   evaluations. No, I can't give you a number, sir.

 9   Q. So you don't have an opinion that any of

10   these orders individually should have been reported

11   to the DEA as suspicious; correct?

12   A. I didn't consider that as -- that's not

13   something I considered in doing this

14   evaluation. Certainly there are orders contained in

15   there that should have been reported to the

16   DEA. The due diligence assumption based on the

17   defendant failures renders, you know, the ability to

18   look at specific orders to report it to the DEA just

19   doesn't make that feasible.

20   Q. How many of these tens of millions of

21   orders should have been reported to the DEA as

22   suspicious?

23   A. I don't have a number, sir.

24   Q. More than a million?

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1   A.   I don't have a number.

2   Q.   More than 1,000?

3   A.   I don't have a number, sir.

4   Q.   More than one or two?

5   A.   I don't have a number.

6   Q.   Okay. And you can't answer any of those

7   questions with any specificity whether it should

8   have been more than a million, more than one or two,

9   more than 1,000; correct?

10   A.   That wasn't the purpose of applying the

11   algorithm to the data was to identify orders that

12   should have been reported to the DEA; no, sir.

13   Q.   So correct?

14   A.   That's correct.

15   Q.   Okay. How many of these orders should have

16   been blocked?

17   A.   The first one.

18   Q.   Okay.

19   A.   And the other ones -- and the other ones

20   should -- it's an open question or broad

21   question. The first one and none of the other ones

22   should have been shipped until the suspicion was

23   eliminated on the first order.

24   Q.   Okay. Well you don't know how many of

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1   these orders were actually evaluated and the

2   suspicion was eliminated on the first order;

3   correct?

4   A.   Well, I draw my assumption on the due

5   diligence that none of them based on the conduct of

6   the companies in regards to how they evaluated their

7   own suspicious orders and I didn't see -- I saw very

8   limited to know due diligence on their own

9   suspicious orders, so I wouldn't have a high

10   expectation that there would have been due diligence

11   on any of these that were identified by the flag.

12   Q.   Okay. And I want to get away from

13   assumptions and expectations because I don't think

14   that's proper for expert witnesses. I want to focus

15   on what you know and what you've done. Am I correct

16   that in method -- well, do you know -- sticking with

17   Method A, do you know how many of those orders are

18   the first flagged orders and how many are the ones

19   that you just bring along for the ride because of

20   the assumption that there was no diligence to

21   justify later orders for that customer; do you know?

22   A.   The first one is the flagged order.

23   Q.   Do you know how many of the first ones

24   there are, as opposed to the later ones, that are

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1   A. All right. I didn't want to answer

2   incorrectly or make assumptions. The first one on

3   Masters A, each defendant would be yes to that

4   answer, the first one.

5   Q. Okay. And so am I correct that for Method

6   A, for each defendant there is one, single order

7   that drives the remaining millions of orders that

8   you have flagged?

9   A. Yes, sir.

10   Q. And have you looked -- have you identified

11   those single orders for -- in their entirety for

12   McKesson, Cardinal, and ABDC?

13   A. I don't understand the question, sir.

14   Q. Have you looked at those initial orders for

15   McKesson, Cardinal, and ABDC that are the initial

16   flagged orders of your Method A?

17   A. No, sir.

18   Q. Do you know the diligence that was

19   conducted on those initial flagged orders for

20   McKesson, Cardinal, and ABDC, not having looked at

21   the actual orders themselves?

22   A. Well, I couldn't know the diligence if I

23   answered I didn't know the orders. And as I

24   answered earlier, understanding your question, I

1   Q.   They should be accurately reported.

2   A.   Yes, sir.

3   Q.   Whether purported to be based on what

4   companies were doing in the real world or what DEA

5   approved, they should actually track what the

6   companies were doing in the real world or what DEA

7   approved; correct?

8   MR. FULLER: Object to form.

9   A.   I'm sorry, I don't understand that

10   question.

11   Q.   Well, as I understand your six

12   methodologies, they purport to be based on systems

13   that different distributors were using; is that

14   correct?

15   A.   I think they're generally supposed to

16   mirror those. I don't think they're exact

17   duplications.

18   Q.   Okay. Is any one of them an exact

19   duplication of a system that was ever used in the

20   real world?

21   A.   No, and I based that statement on -- unless

22   -- unless I'm uninformed -- or don't know the

23   correct answer is, I don't -- do not think we have

24   the code for any of the methodologies. So without

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1   having the exact code, I'm -- I can't definitively

2   say they are. I think they -- I think the

3   methodologies as I've explained them are what they

4   are. They -- you know, they measure what -- what

5   they measure.

6   And then -- and some of them are a

7   likeness or a mirror, some of the systems that were

8   used by the defendants. But none of them are an

9   exact duplication of the defendant.

10   Q.   Okay. Let me -- let me jump ahead. Let's

11   mark tab 6, please.

12   (Deposition Exhibit 6 was marked.)

13   Do you recall saying that you read

14   Doctor McCann's testimony in this case?

15   A.   Uhm, I did.

16   Q.   I'm going to show you some of his testimony

17   from this case. Let me know when you've got tab 6

18   handy. And let's go to page 124, line 18 through

19   125:6. And tell me when you're with me,

20   Mr. Rafalski.

21   MR. FULLER: Could you give the pages

22   again. My apologies.

23   MR. SCHMIDT: Of course, yes. 124:18

24   to 125:6.

1 through E?

2   A. I don't know if I would call them

3 illustrations. I wouldn't use that exact

4 language. I -- I -- like I stated earlier, they

5 weren't -- they weren't -- I don't know that they --

6 well, I know that they were never intended to be

7 exact duplications of the -- of the methodologies

8 that are used by the defendants because we didn't

9 have the code. I don't know if stylized

10 illustrations would be a good description. I think

11 they generally mirrored the -- those triggering

12 algorithms, but not exactly.

13   Q. It was Doctor McCann who attempted to come

14 up with the code; correct?

15   A. Oh, yes, sir, I couldn't write code.

16   Q. It was Doctor McCann who implemented the

17 code; correct?

18   A. Yes, sir.

19   Q. And so when Doctor McCann said that "each

20 of those methods are stylized illustrations

21 suggested by the underlying documents," was that an

22 accurate or inaccurate statement on his part? Do

23 you take issue with that as an accurate statement?

24 And let me just ask the question again.

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1   When Doctor McCann suggested that "each

2   of these methods are stylized illustrations

3   suggested by the underlying documents," do you take

4   issue with the accuracy of that statement by the

5   person who created the code and ran the code?

6   A.   No, I don't take exception to that

7   statement, sir.

8   Q.   Okay. Method E, if you look back at

9   Exhibit 1, is purportedly based on a method that

10 McKesson used; correct? The maximum 8,000 dosage

11 units monthly.

12   A.   It is.

13   Q.   Do you know when McKesson used it?

14   A.   They used it for a one-year time period, I

15 think it was 2007 to 2008.

16   Q.   Did the DEA endorse that method in any way?

17   A.   No, I don't believe they endorsed it.

18   Q.   Did they know about it?

19   A.   Uhm, I don't definitively know the answer

20 to that, so I'm not going to guess.

21   Q.   Did McKesson make a point of telling the

22 DEA that it would use that method?

23   A.   I don't recall reviewing that document. If

24 you have something and you -- I'd like to review it,

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 1      A.   Okay.

 2      Q.   There's a reference to the trailing six

 3   month maximum monthly; do you see that?

 4      A.   Yes, sir.

 5      Q.   That's Method B; correct?

 6      A.   Yes.

 7      Q.   And did --

 8      A.   Both A and B.

 9      Q.   Well, no, it's just A; correct?  If you

10   read the full title "Fixed After First Triggered

11   Threshold," that's only B; correct?  Did I lose you,

12   sir?

13      A.   No, I'm here.  I'm just rereading it.  No,

14   I believe that -- that's also used in B, it's fixed.

15      Q.   It's only used in B; correct?

16      A.   Well, yes, because the first -- the first

17   -- it's semantics, but the first order under A stops

18   the application because of the due

19   diligence.  That's what you are getting at, yes.

20      Q.   I see what you're saying.  Let me focus on

21   B.  Under B, the first time you have a -- well, the

22   first six months set all preceding six months;

23   correct?

24      A.   Yes, sir.
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1   Q.   The threshold is never changed under Method

2   B based on any subsequent developments; correct?

3   A.   That's correct.

4   Q.   It doesn't change if the population in

5   Cabell County changes; correct?

6   A.   That's correct.

7   Q.   It doesn't change if the medical need in

8   Cabell County changes; correct?

9   A.   It's fixed, sir; right after the first

10   trigger.

11   Q.   So correct?

12   A.   Yes.

13   Q.   It doesn't change if the demographics of

14   the pharmacy or the circumstances of the pharmacy

15   change; correct?

16   A.   It does not.

17   Q.   If a cancer center opens up next door or a

18   competing pharmacy closes, that doesn't cause a

19   change in Method B; correct?

20   A.   It does not.

21   Q.   It doesn't change to account for increases

22   in the DEA's own quotas; correct?

23   A.   That is correct.

24   Q.   Now, Masters did not lock in the first six

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1   literally, that means that there's been due

2   diligence applied and the -- they -- they

3   definitively identified this order as suspicious and

4   they're reporting it to the DEA. And if you are

5   just speaking about the trigger, I want to make sure

6   before I answer that I get a clarification on at

7   what point you are discussing.

8   Q.   Okay. Let me just read you -- let me just

9   ask you a yes/no question then. If a customer

10 identifies a suspicious order, does that require the

11 suspension of all orders or sales of other

12 controlled substances to that customer?

13   A.   No.

14   Q.   Okay. In your Methodology A, if -- if a

15 customer identifies a suspicious order, all

16 subsequent suspicious orders are treated -- all --

17 let me try again.

18   Under your Methodology A, you told me

19 all of the orders under Methodology A should be

20 blocked; correct?

21   A.   After the first trigger; yes, sir.

22   Q.   Under your Methodology A, once a customer

23 -- once a distributor identifies an order as

24 suspicious, they should suspend all subsequent

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1   orders; correct?

2   A.   Yes, based on the assumption that there's

3   no due diligence conducted. It's -- well.

4   Q.   Do you know if --

5   A.   Hold on a second, maybe I didn't -- I'm

6   thinking about that question. Maybe I didn't

7   understand it. It's not a matter of using that

8   trigger to tell a registrant what to do and what not

9   to do. Just -- and I think your -- your -- I don't

10 know if we're on the same page.

11   What that methodology does is just

12 triggers the first order. It doesn't make the

13 assumption and tell a registrant what they should

14 and shouldn't do. I mean, the regulations are clear

15 what they should do. So I'm not sure I answer -- I

16 understood your question on that last answer.

17   Q.   Okay. If an order is triggered under

18 Method A and you apply your assumption of no due

19 diligence after that, every order should be blocked

20 after that; correct?

21   A.   Every order should be blocked until there's

22 sufficient due diligence to clear that order and

23 rule out that diversion was going to occur.

24   Q.   Okay.